Supreme Court, U. S.
FILED
JAN 7 1978
MICHAEL RODAK, JR., CLERK

No. 77-742

In the Supreme Court of the United States

OCTOBER TERM, 1977

JEROME MILLER, Individually and as Director of **THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES** and **THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES** of the **STATE OF ILLINOIS**,

Appellants,

vs.

MARCEL YOUAKIM and **LINDA YOUAKIM** individually and as foster parents, **TIMOTHY ROBERTSON**, a minor, by his sister and next friend **LINDA YOUAKIM**, **MARY LOU ROBERTSON**, a minor, by her sister and next friend **LINDA YOUAKIM**, **LARRY ROBERTSON**, a minor by his sister and next friend **LINDA YOUAKIM**, and **SHERRY ROBERTSON**, a minor, by her sister and next friend **LINDA YOUAKIM**, and all others similarly situated,

Appellees.

On Appeal From the United States Court of Appeals for the Seventh Circuit

MOTION TO AFFIRM

ROBERT P. BURNS
ROBERT E. LEHRER
JAMES D. WEILL
Legal Assistance Foundation of Chicago
343 S. Dearborn, Room 800
Chicago, Illinois 60604
(312) 341-1070

PATRICK KEENAN
University of Detroit School of Law
Legal Aid Clinic
651 East Jefferson
Detroit, Michigan 48226
(313) 927-1541

Attorneys for Appellees

Date: January 7, 1977

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60518 (312) 525-6581

INDEX

	PAGE
Opinion Below	2
Jurisdiction	2
Question Presented	2
Constitutional Provisions, Statutes, and Regulations Involved	2
Statement of the Case	3
Argument	7
The Plain Meaning Of The Statute And The Unanimous Judicial Construction Thereof Support The Ruling Below	7
The Consistent Interpretation Of The Statute By The Department Of Health, Education, And Welfare, In Which The Solicitor General Concurs, Supports The Ruling Below	13
Construing Section 408 In Light Of The Purposes Of The Federal Foster Care Program Supports The Ruling Below	16
Conclusion	21
Appendix A (Regulations)	App. 1
Appendix B (Memorandum of the Solicitor General)	App. 6
Appendix C (Unreported Cases)	App. 13

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES CITED

I. *Cases*

PAGE

Albemarle Paper Company v. Moody, 422 U.S. 405 (1975) 15

Burns v. Alcala, 420 U.S. 575 (1975) 7, 12

Carleson v. Taylor, 404 U.S. 980, *aff'g mem.* Taylor v. Martin, 330 F.Supp. 85 (N.D. Cal. 1971) 21

Clampett v. Madigan, Pov. L. Rptr. (CCH) ¶ 17,979 (D.S.D. May 24, 1973) 8

Dandridge v. Williams, 397 U.S. 471 (1970) 20

Doe v. Flowers, 416 U.S. 922 (1974), *aff'g mem.* 364 F. Supp. 953 (N.D. W.Va. 1973) 21

Jackson v. Ohio Department of Public Welfare, No. 72-182 (N.D. Oh. April 1972) 8

Jones v. Davis, Civ. 76-805 (D. Or. February 1, 1977), *appeal docketed* No. 77-2254 (9th Cir. June 7, 1977) .. 7

King v. Smith, 392 U.S. 309 (1968) 7

Maher v. Buckner, 98 S.Ct. 290 (1977), *aff'g mem.* 424 F. Supp. 366 (D.Conn. 1976) 21

Philbrook v. Glodgett, 421 U.S. 707 (1975) 7, 17

Red Lion Broadcasting Company v. F.C.C., 395 U.S. 367 (1969) 14

Rosado v. Wyman, 397 U.S. 397 (1970) 15

Shapiro v. Solman, 396 U.S. 5, *aff'g mem.* 300 F. Supp. 409 (D. Conn. 1969) 22

PAGE

Shea v. Vialpando, 416 U.S. 251 (1974) 10, 15

Swank v. Rodriguez, 403 U.S. 901 (1971), *aff'g mem.* 318 F. Supp. 289 (N.D. Ill. 1970) 21

Townsend v. Swank, 404 U.S. 282 (1971) 7

Udall v. Tallman, 380 U.S. 1 (1975) 14

Wyman v. Boddie, 402 U.S. 991 (1970) 21

Youakim v. Miller, 562 F.2d 483 (7th Cir. 1977), *aff'g* 431 F.Supp. 40 (N.D. Ill. 1976) 6, 7, 11, 16

Youakim v. Miller, 425 U.S. 231 (1976) 5, 14

Youakim v. Miller, 374 F. Supp. 1204 (N.D. Ill. 1974) .. 5

Zuber v. Allen, 369 U.S. 168 (1969) 15

II. *Federal Constitutional Provisions*

U.S.Const. art. VI, cl. 2 (the Supremacy Clause) 2

III. *Federal Statutes*

Social Security Act of 1935, §401, 42 U.S.C. §601 (1970) 2, 5, 20

Social Security Act of 1935, §402 (a) (10), 42 U.S.C. §602 (a) (10) (Supp. V 1975) 7

Social Security Act of 1935, §406, 42 U.S.C. §606 (1970) 16

Social Security Act of 1935, §408, 42 U.S.C. §608 (1970) 2, 5, 8, 9, 10, 11, 12, 14, 16, 17, 20, 21

PAGE

IV. *Federal Regulations*

Department of Health Education, and Welfare Program Instruction APA-PI-75-9 13

45 C.F.R. §228.12 (1976) 17

45 C.F.R. §233.10 (a) (1976) 13

45 C.F.R. §233.110 (b) (1976) 14

Department of Health, Education, and Welfare, Handbook of Public Assistance Administration, pt. IV, §3452(2) (7/24/63) 2, 14

V. *Opinion of the U.S. Solicitor General*

Memorandum for the United States as *Amicus Curiae* to the United States Supreme Court in *Youakim* v. *Miller*, 425 U.S. 231 (1976) 15

VI. *Illinois State Statutes*

Ill.Rev.Stat., ch. 23, §10-2 (1975) 3

Ill. Rev. Stat., ch. 37, §§704-1—704-8 3

VII. *Legislative Reports and Hearings*

S.Rep. No. 165, 87th Cong., 1st Sess., reprinted in [1961] U.S. Cong. and Ad. News, 1719 .....19, 20

Hearings on H.R. 10032 Before House Committee on Ways and Means, 87th Cong. 2nd Sess. (1962) 20

H.Rep. No. 544, 90th Cong. 1st Sess. (1967) 19

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-742

JEROME MILLER, Individually and as Director of **THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES** and **THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES** of the **STATE OF ILLINOIS**,

Appellants,

vs.

MARCEL YOUAKIM and **LINDA YOUAKIM** individually and as foster parents, **TIMOTHY ROBERTSON**, a minor, by his sister and next friend **LINDA YOUAKIM**, **MARY LOU ROBERTSON**, a minor, by her sister and next friend **LINDA YOUAKIM**, **LARRY ROBERTSON**, a minor by his sister and next friend **LINDA YOUAKIM**, and **SHERRY ROBERTSON**, a minor, by her sister and next friend **LINDA YOUAKIM**, and all others similarly situated,

Appellees.

On Appeal From the United States Court of Appeals for the Seventh Circuit

MOTION TO AFFIRM

Appellees move that the final judgment and order of the Court of Appeals be affirmed on the ground that the Court's interpretation of the Social Security Act is manifestly correct in light of the plain meaning of the federal statute, the unanimous authority of the federal courts which have

considered the issue presented, the interpretation of the agency charged with the administration of the statute, and the opinion of the Solicitor General of the United States, and does not need further argument.

OPINION BELOW

The memorandum opinion and order of the Court of Appeals are reported at 562 F.2d 483 (7th Cir. 1977) and are set forth in Appendix B of appellants' Jurisdictional Statement.

JURISDICTION

The jurisdictional requirements are adequately set forth in the appellants' Jurisdictional Statement.

QUESTIONS PRESENTED

Does Illinois' denial of Federal Foster Care eligibility and benefits to needy children judicially removed from their homes, declared wards of the state, and placed in foster homes maintained by foster parents related to such children violate the Social Security Act §§401 and 408, 42 U.S.C. §§601, 608 (1970) and therefore the Supremacy Clause of the United States Constitution, U.S. CONST., art. VI, cl. 2.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The relevant provisions are set forth at pp. 3-4 of appellants' Jurisdictional Statement, and in Appendix A thereto, with the exception of the following, which are set out in Appendix A of this Motion to Affirm:

> Department of Health, Education, and Welfare Program Instruction APA-PI-75-9 (October 24, 1974), Subject: AFDC-Foster Care
>
> 45 C.F.R. §233.110.
>
> Handbook of Public Assistance Administration, pt. IV §3452(a).

STATEMENT OF THE CASE

This case concerns Illinois' denial of the Federal Foster Care eligibility and benefits under the Social Security Act to minor wards of the state placed in the homes of foster parents who are related to them (e.g., grandparents, adult sisters and brothers). The verified complaint and uncontested facts indicate that in May, 1969, an Illinois Circuit Court determined that Timothy, Mary Lou, Larry, and Sherry Robertson were delinquent, otherwise in need of supervision, and neglected in their mother's home and declared them wards of the State of Illinois and, as such, foster children pursuant to *Ill.Rev.Stat.*, ch. 37 §§704-1—704-8 (1975). At the time they were declared wards, Timmy was 3, Mary Lou was 5, Larry was 8, and Sherry was 10 years of age. For three years, from 1969 to 1972, state officials placed the children in a variety of orphanages and foster homes of persons unrelated to them, to which the state officials paid full benefits under the Federal Foster Care program.

In 1972, after three years of state wardship, Timmy and Mary Lou Robertson were placed, as foster children, in the home of Michael Youakim. Michael Youakim's wife, Linda Youakim, is the adult sister of Timmy and Mary Lou Robertson. The Youakims were under no legal obligation to support Timmy and Mary Lou, nor were they obliged to accept the placement made by the state officials. See *Ill. Rev.Stat.*, ch. 23, §10-2 (1975). Nevertheless, after the officials had specifically approved the Youakims' home as meeting the standards for the care of a "foster child" and approved the Youakims as foster parents, the Youakims accepted the placement of Timmy and Mary Lou as foster children in their home. This approval was incorporated in a "Home Placement Agreement" which the state officials required the Youakims to sign, and which was ma-

terially identical to the form used with respect to all foster parents approved by the state officials—except that the officials struck the word "foster" in some, but not all, of the places it appeared on the form, and struck the paragraph providing that the foster parents would receive Foster Care benefits for the care of the children.

Solely because Mrs. Youakim was related to the children, the state officials, under prevailing state policy and practice, refused to provide Federal Foster Care benefits, which would have equalled $210 a month for the two children. The Youakims were forced to apply on behalf of the children for regular Aid to Families with Dependent Children ("AFDC") to provide in part for Timmy and Mary Lou. AFDC benefits were and are, however, substantially lower than federally-mandated Foster Care benefits, and do not include the social services specifically designed to meet the special needs of children judicially removed from their own homes by court order.

The Youakims, in providing foster care for Timmy and Mary Lou Robertson, incurred expenses substantially in excess of the AFDC benefits which the children received. Due to that strain on their resources, and the likelihood of an even greater strain should they accept more children without foster care benefits, the Youakims were unable to accept either Larry or Sherry Robertson into their home as foster children. Thus Larry remained in an orphanage, and Sherry in an unrelated foster home (both of which were eligible for full Federal Foster Care benefits in Illinois) and the Robertson children remained separated from one another at the time of the filing of this lawsuit.

The Youakims and the foster children herein claim that the denial of Federal Foster Care benefits to otherwise eligible minor wards of the state solely because they are placed

as foster children in the homes of relatives, violates the Social Security Act §§401, 408, and therefore the Supremacy Clause of the United States Constitution.

This case was previously before this Court on appeal by the children from a ruling of a three-judge court that the Illinois policy at issue did not violate the equal protection clause of the United States Constitution, *Youakim* v. *Miller,* 374 F. Supp. 1204 (N.D.Ill. 1974) (Jurisdictional Statement, Appendix E). On March 21, 1976, this Court issued a *per curiam* opinion, remanding this case to the District Court for consideration of the issue of conflict between the Illinois law and the Social Security Act which had not been directly presented to or addressed by the three-judge court below. *Youakim* v. *Miller,* 425 U.S. 231 (1976). In entering the remand order, the Court noted that the Department of Health, Education, and Welfare ("HEW"), the federal agency charged with administering the Federal Foster Care program, had issued a Program Instruction (Appendix A hereto) which fully supported the foster children's claim that the Illinois scheme violated the Social Security Act, *Id.* at 235, and that such an interpretation was "a substantial factor to be considered in construing the Statute." It also noted that the Solicitor General had filed a statement with this Court that the Illinois foster care program was inconsistent with the Social Security Act, *Id.* (Appendix B).

On remand, a single judge district court certified a plaintiff class of foster children in related foster homes and ruled that:

> 1. *Ill.Rev.Stat.,* ch. 23 §§2212.05, 2212.17 and implementing policies and procedures of the Illinois Department of Children and Family Services ("DCFS") are contrary to 42 U.S.C. §§601 and 608, implementing federal regulations, and Department of Health, Educa-

tion, and Welfare Program Instruction APA-PI-75-9, and are therefore invalid under the Supremacy Clause of the United States Constitution, Article VI, cl. 2 insofar as they exclude from eligibility, or deny full Aid to Families with Dependent Children—Foster Care payments (hereinafter, "full AFDC-F' payments") under 42 U.S.C. §608, or ancillary public assistance benefits and services, . . . to . . . .

> (a) dependent foster children otherwise eligible for these full AFDC-F payments and ancillary benefits, because such children live in foster family homes . . . maintained by foster parents or other persons . . . who are related to them; . . . .

A unanimous Court of Appeals affirmed the judgment of the district court, 562 F.2d 483 (7th Cir. 1977).

ARGUMENT

THE PLAIN MEANING OF THE STATUTE AND UNANIMOUS JUDICIAL CONSTRUCTION THEREOF SUPPORT THE RULING BELOW

The Social Security Act ("Act") specifies the eligibility criteria for participation in the categorical public assistance programs administered by the states. The states are obliged, under Section 402(a)(10) of the Act, 42 U.S.C. §602(a)(10) (Supp. V 1975), as a condition of the receipt of federal funds for their programs, to provide " 'that aid to families with dependent children shall be furnished with reasonable promptness to *all eligible* individuals,' " *Townsend* v. *Swank,* 404 U.S. 283, 285 (1971). State eligibility criteria which are inconsistent with, or additional to, those of the Social Security Act violate the Act, and thus the Supremacy Clause of the United States Constitution. *Philbrook* v. *Glodgett,* 421 U.S. 707 (1975); *King* v. *Smith,* 392 U.S. 309 (1968). In short, "once the federal standard of eligibility is defined, a participating state may not deny aid to persons who come within it in the absence of a clear indication that Congress meant the coverage to be optional." *Burns* v. *Alcala,* 420 U.S. 575, 580 (1975).

Every court which has directly considered the issue presented here has ruled, on the basis of the specific provisions, history and purpose of the Foster Care sections of the Social Security Act, that the exclusion of related foster family homes from eligibility for Federal Foster Care benefits violates the Act. *Youakim* v. *Miller,* 431 F. Supp. 40 (N.D.Ill. 1976), *aff'd.* 562 F.2d 483 (7th Cir. 1977); *Jones* v. *Davis,* Civ. 76-805 (D.Or. February 1, 1977),

appeal docketed, No. 77-2254 (9th Cir. June 7, 1977); *Clampett* v. *Madigan,* Pov. L. Rep. (CCH) ¶17979 (D.S.D. May 24, 1973); cf. *Jackson* v. *Ohio Department of Public Aid,* No. 72-182 (N.D.Oh. April, 1972) (Unreported cases appear in Appendix C hereto). The Department of Health, Education, and Welfare ("HEW"), the agency charged with the administration of the Federal Foster Care program, and the Solicitor General of the United States have concurred in that interpretation of the Act. (Appendices A and B.) There is no contrary interpretation from any court or federal administrative agency.

Section 408(a) of the Act defines the term "dependent child" for purposes of Foster Care Eligibility. A dependent foster child is a child

> (1) who has been removed from the home of a relative, as the result of a judicial determination that continuation therein would be contrary to the welfare of the child, 42 U.S.C. §608(a)(1); and
>
> (2) whose placement and care are the responsibility of the agency administering the AFDC program, or, as in Illinois, an agency (DCFS) responsible to such an agency, 42 U.S.C. §608(a)(2); and
>
> (3) who has been placed in a foster family home or child care institution as a result of such judicial determination, 42 U.S.C. §608(a)(3); and
>
> (4) who was eligible for AFDC benefits at the time the court proceedings leading to his removal from the home of a relative were initiated, or within six months prior thereto, 42 U.S.C. §608(a)(4). See also 45 C.F.R. 233.110(a)(1) (1976).

Plaintiffs and class members here meet this statutory definition of eligibility: (1) they have been removed from their parents' home by court findings of neglect, etc.;

(2) they are under the legal custody and care of the state agency responsible for such children, which is responsible to the welfare department for running the federal foster care program; (3) they have been placed in foster family homes; and (4) they were eligible for regular AFDC in the parental home from which they were removed. Thus they would be eligible under the federal statutory definition in Section 408(a) except that Illinois has engrafted onto Section 408(a)(3) an additional eligibility requirement: under Illinois law the children must be "placed in a foster family home" maintained by a non-relative. But this is not only an unjustifiable accretion to Section 408(a)(3), it directly contravenes the definition of foster family home which immediately follows in Section 408(b).[1]

Section 408(b) defines the term "AFDC" for purposes of Federal Foster Care eligibility. And that provision specifically defines such benefits as money payments made to otherwise eligible foster children living with "any individual":

> The term 'aid to families with dependent children' shall . . . include also foster care in behalf of a child described in paragraph (a) of this section—(1) in the foster family home of any individual.

Thus an otherwise eligible foster child as defined in Section 408(a) may live in the home of "any individual." The

---

[1] The number of children meeting these requirements and who are members of the class is relatively small. Approximately 1700 children were excluded from eligibility because of placement in the homes of related foster parents in Illinois in fiscal 1977. (R. Doc. No. 45, Affidavit of Chief of Information Systems, DCFS) In March of 1977 over 559,000 children were receiving AFDC in Illinois. Office of Research and Statistics, HEW, *Public Assistance Statistics,* March, 1977.

State officials never explain away the import of the phrase "any individual" as used in Section 408(b).

In *Shea* v. *Vialpando,* 416 U.S. 251 (1974), this Court recently had occasion to consider the meaning of the word "any" in another provision of the Social Security Act:

> By its terms, §402(a)(7) requires the consideration of 'any' reasonable work expenses in determining eligibility for AFDC assistance. In light of the evolution of the statute and the normal meaning of the term 'any' we read this language as a congressional directive that no limitation, apart from that of reasonableness, may be placed upon the recognition of expenses attributable to the earning of income.

416 U.S. at 260.

To support their reading of §408 of the Act, the State officials must read "any individual" in §408(b) as "any individual (except one related to the foster child)." This reading does not square with the "normal meaning" of the word "any," *Id.*

As the Court of Appeals noted, 562 F.2d at 487 (Jurisdictional Statement, App. B) Section 408 also defines the term "foster family home":

> For purposes of this section, the term "foster family home" means a foster family home for children which is licensed by the State in which it is situated or has been approved, by the agency of such State responsible for licensing homes of this type, as meeting the standards established for such licensing . . .

The Court of Appeals held, *Id.* at 488, that the Home Placement Agreement and Illinois' Family Placement Manual pursuant to which it was executed, indicated that the Youakim home must meet and had met standards for foster care placement. Thus the failure of the Youakim home to be "officially designated a foster care facility" stemmed entirely from the very state provision "which

directly conflicts with the federal statutory definition" of "foster family home."[2] *Id.*

Both the district Court and the Court of Appeals concluded that the "plain words and meaning" of these provisions of Section 408 mandate Federal Foster Care eligibility for the plaintiff class of foster children. 562 F.2d at 486, 431 F. Supp. at 43 (Jurisdictional Statement, App. B).[3] The State officials are reduced to arguing simply that

---

[2] The state continues here (pp. 16-17) to press its totally circular argument regarding the non-licensing of the Youakims' home. As the Court of Appeals correctly noted:

> We do not understand the DCFS to be contending that its staff workers ignored the criteria established in the Placement Manual. That the home of the Youakims was not 'officially designated as a foster care facility,' *see* note 5 *supra,* stems entirely from the want of power under Illinois law to make such an official designation. The very statutory provision struck down in the lower court's judgment order defines a 'foster family home' as a facility for child care in the residences of families who receive children *unrelated* to them. Ill. Rev. Stat. 1975. ch. 23 §2212.17. The DCFS can hardly rely upon a definition of 'foster family home' which directly conflicts with the federal statutory definition as a way of upsetting the district court's determination of a violation of the Supremacy Clause. Nor can the DCFS procedure of striking out the word 'foster' wherever it appears in a Foster Home Placement Agreement be determinative of the Youakims' right to foster care benefits. (footnote omitted)

562 F.2d at 488.

[3] Indeed at oral argument before the Court of Appeals, the DFCS admitted that "[i]t's very true that under the [federal] foster care program the relatives' home is not excluded from coverage under this program—It's not literally excluded." During oral argument before the original three-judge court, the DCFS similarly admitted that "[t]here is nothing in Federal or State statutes which bars payment to foster parents of related children, that plaintiffs have repeatedly stressed." 562 F. 486 n. 4.

Section 408 does not "*expressly* include or exclude from foster care assistance" otherwise eligible foster children who are placed with relatives. (Jurisdictional Statement, p. 11)[4] (emphasis added). But once Congress specified the eligibility criteria for the program, it could have no reason *explicitly* to include a subgroup (relatives) specified by one of the innumerable characteristics (relatedness), wholly irrelevant to the chosen eligibility criteria. Under a canon of statutory interpretation implicit in appellants' argument, no individual who met all the eligibility criteria established by a statute would ever be "clearly" eligible for benefits under that statute, since it would always be possible to identify an additional characteristic of the individual about which the statute is silent, and claim that the statute is therefore "ambiguous" as to his eligibility. (Jurisdictional Statement, p. 11.)

In sum, the eligibility definitions in 42 U.S.C. §608 establish that otherwise eligible foster children are eligible for Federal Foster Care benefits upon placement in a foster home maintained by any individual, related or not. Moreover, every court which has addressed the question agrees.

---

[4] They also advance the argument that this Court's decision in *Burns* v. *Alcala*, 420 U.S. 575 (1975), supports their reading of Section 408. (Jurisdictional Statement, p. 13). But this Court, one year after the decision in *Burns*, vacated the original three-judge court decision in this case partly on the ground that HEW's contrary position suggested that the State officials' position would be in violation of the Act. That fact hardly suggests that this Court had previously considered the question in this case in *Burns*, much less decided it. The excerpt the State officials cite from *Burns* simply characterizes the Foster Care Program in respects wholly irrelevant to this case.

THE CONSISTENT INTERPRETATION OF THE STATUTE BY THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, IN WHICH THE SOLICITOR GENERAL CONCURS, SUPPORTS THE RULING BELOW

HEW's interpretation of the Federal Foster Care program statute, and its own regulations, wholly support the foster children's position here. Program Instruction APA-PI-75-9 (October 24, 1974) provides in pertinent part:

> This program instruction is issued to resolve the problem of some states not licensing or approving homes of nonlegally liable relatives as foster care homes even though suitable foster care could be provided in the homes and payments made at the foster care rate when children are placed with relatives who meet all conditions of eligibility for AFDC-FC.
>
> • • •
>
> Under 45 C.F.R. §233.110(a)(1) states must provide for aid in the form of foster care for each otherwise eligible child as specified in the Act and in 233.110(b) . . . *These provisions apply regardless of whether the licensed or approved foster family home in which a child is placed is operated by a relative (with no legal responsibility to support the child).*
>
> When a child has been removed from his home by judicial determination and is placed in foster care under the various conditions specified in Section 408 of the Social Security Act and 45 C.F.R. §233.110, the foster care rate of payment prevails *regardless of whether or not the foster home is operated by a relative.* . . . (Emphasis added.)

The Program Instruction was issued for the purpose of bringing some recalcitrant states into compliance with long-standing HEW policy incorporated in 45 C.F.R. §233.110(a)

and (b) (1971), codifying HEW Handbook of Public Assistance Administration, pt. IV, §3452(2) (1963).[5]

It was in light of HEW's interpretation of Section 408 of the Act that this Court previously remanded this case, stating that it was "a substantial factor to be considered in construing the statute." 425 U.S. at 235. This was simply an application of the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong. . . ." *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, 381 (1969). See also *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965) (Secretary of Interior's interpretation of law he is charged with executing entitled to "great deference," and Court need not find that it is only reasonable interpretation to sustain it.)

The case was also remanded in light of the Solicitor General's statement agreeing with the foster children and HEW's interpretation of the Act. In his Amicus Curiae brief the Solicitor stated:

[5] The state officials assert that "HEW" adopted a contrary position—one supporting the state officials—in 1971. (Jurisdictional Statement, p. 20.) In fact, the state reference to the HEW position is to an opinion of one local HEW employee in Chicago, as expressed in a letter to an Illinois Department of Public Aid employee. There is nothing in that letter, or anywhere in the record, to indicate that that opinion—unsupported by the language, purpose, or history of the Act or previous HEW policy—represented a considered HEW policy applied to all state agencies, rather than the ill-considered judgment of a single local HEW official. It does not detract from the force of the unequivocal longstanding *agency* interpretation of the Act, as expressed in official HEW regulations and program instructions. The context of the local official's letter, the content of the letter or other inquiry to which it was a response, and the reasons the state made the inquiry, have never been presented by the state in this case.

> Appellants [the children] concededly meet all of [the eligibility] conditions [found in §408] and therefore qualify for AFDC-FC. The additional requirement imposed by the State of Illinois . . . is contrary to the decisions of this Court which have prohibited the states from narrowing specific federal eligibility criteria without congressional authorization [citations omitted].
>
> The denial of foster-care benefits to children living with relatives is likely to make relatives unwilling to accept the children and lead to the placement of children in foster homes of non-relatives. This result would be inconsistent with the policy stated in 42 U.S.C. §601 that the AFDC program is aimed at 'encouraging the care of dependent children in their own home or in the homes of relatives.' (Appendix B.)

While the state officials, of course, dispute HEW's interpretation of the Act, as expressed in its regulations, (Jurisdictional Statement, pp. 20-21) their arguments ironically reinforce the proposition that HEW's construction of the Act is entitled to substantial weight here. Thus, the state officials assert that Section 408 is "ambiguous" (Jurisdictional Statement, p. 11) and that it is both "necessary and appropriate" to construe the Federal Foster Care statute in light of the entire "federal welfare scheme . . ." *Id.* But the "sound principle of according deference to administrative practice" is applicable precisely "where the relevant statutory language is unclear or susceptible of differing interpretations," *Shea* v. *Vialpando*, 416 U.S. 251, 262 n.11 (1974). And this Court has consistently deferred to "the attempt of an experienced agency to harmonize . . . [a particular statutory provision] with the basic structure of the program it administers." *Rosado* v. *Wyman*, 397 U.S. 397, 415 (1970); cf. *Zuber* v. *Allen*, 396 U.S. 168, 192 (1969). See *Albemarle Paper Company* v. *Moody*, 422 U.S. 405, 431 (1975) (Administrative guidelines interpreting the relevant statute are entitled to "great deference" even though not formal "regulations.")

CONSTRUING SECTION 408 IN LIGHT OF THE PURPOSES OF THE FEDERAL FOSTER CARE PROGRAM SUPPORTS THE RULING BELOW

Bereft of support from the statute itself, from court decisions, from HEW, or from the Solicitor General, the State officials have "constructed an elaborate . . . argument, regarding an implied legislative intent to exclude relatives from the denotation of the word 'foster'." *Youakim* v. *Miller*, 562 F.2d 483, 486 (7th Cir. 1977). *See* Jurisdictional Statement, pp. 12 ff. They assert first that the plaintiff foster children were, prior to the enactment of the Federal Foster Care program, eligible for the regular Aid to Families with Dependent Children program. (Jurisdictional Statement, p. 12.) In this context, their argument is basically that "the more recently enacted Section 408 foster care benefits could only have been intended to reach a group of children not previously entitled to federal welfare assistance—that is, needy dependent children who are placed in unrelated homes." *Id.*

Stripped of its trappings, the State officials' argument rests upon the remarkable proposition that having once defined categorical welfare eligibility for a particular class of children, Congress cannot formulate an intent to redefine eligibility to meet the greater common needs of a group containing both previously covered and uncovered children.[6] But Congress obviously can identify, and has here identified, a particular problem, common to both a subgroup of existing recipients and a sub-group of non-recipients, and can formulate a new program for which both subgroups are eligible on the basis of shared characteristics

[6] Accordingly, the State officials suggest that the foster children's position is that they are eligible for both regular AFDC benefits (under 42 U.S.C. §606) and AFDC-F benefits (under 42 U.S.C. §608). Jurisdictional Statement, p. 17. As noted in the text, there is not overlapping eligibility; rather, Congress has redefined the foster children's eligibility to make them eligible for the Federal Foster Care program.

set forth in detail in the statute. Cf. *Philbrook* v. *Glodgett*, 421 U.S. 707 (1975). (Enactment of AFDC-Unemployed Father Program). In such a situation, as here, Congress can identify the need and those children sharing it, shape benefits to meet that need, and mandate special services.

The Federal Foster Care program provides higher benefits and more intensive services than the regular AFDC program.[7] These higher benefits and services are responsive

[7] Foster children who, by definition, have been determined neglected, are to be "assure[d]" receipt of proper care by development of an individual social services plan. §408(f). Moreover, foster children must be placed in homes meeting nationally recognized licensing standards, consistent with the provision of a home environment better suited to their needs. §408(f), 45 C.F.R. 228.12. Also, services must be provided to the home from which a foster child is removed to facilitate his permanent return to that home, or, failing that, permanent placement with other family members. §408(f). None of these intensive services are available—or even appropriate—for children in the regular AFDC program. Further, Congress has helped insure that states would be able to pay higher foster care rates by increasing the level for federal matching shares for benefit payments up to $100/month for children receiving AFDC-FC benefits. 42 U.S.C. §603(a)(1)(B) (1970). And all states' foster care benefits are higher than regular AFDC benefits. See HEW Publication No. (SRS) 76-03200, NCSS Report D-2, *Aid to Families with Dependent Children, Standards for Basic Needs* (July, 1975), and HEW Publication No. (SRS) 77-03100, NCSS Report A-2, Public Assistance Statistics (May, 1976). The State officials never discuss the significance of the additional benefits and intensive services provided under the program, except to argue that the statute's provision of certain services under §408(f) somehow supports their position. (Jurisdictional Statement, 18). The Court of Appeals, of course, rejected this argument, 562 F.2d at 489-90, which the State officials acknowledge by stating "[t]he Court of Appeals] could only state that three other interpretations [of §408(f)] are plausible." (Jurisdictional Statement, 18). In fact, the Court of Appeals ruled that: *"Only* three readings of the sub-section are plausible," *Id.* at 489 (1977) (emphasis added) and that, on the reading of §408(f) *most favorable* to the State officials, the sub-section was wholly consistent with the childrens' interpretation of the statute, *Id.* at 490.

to a deprivation which foster children living with related foster parents have suffered no less than foster children living with unrelated foster parents. All foster children, *members of the plaintiff class included,* have been neglected or otherwise deprived of adequate care in their homes, to a degree necessitating removal from such homes because of a judicial determination that remaining there would be contrary to their welfare. Later placement of such children with relatives (or with non-relatives) does not change this fact about the children or their poor home environment. In this context, it is illogical to argue, as the State officials do, that Congress intended that they should be excluded from the Federal Foster Care Program. Such children, members of the plaintiff class, stand similarly situated to children living in unrelated foster homes with respect to the deprivation to which they have been subject and their need for additional benefits and intensive services of the Foster Care program. To have intended to exclude them, Congress must have intended not to meet the special needs of foster children placed with relatives. But Congress never limited or showed an intent to bifurcate the class of children traumatized by their mistreatment in and removal from their parental homes. On the contrary, the legislative history surrounding enactment of the foster care provisions reflects Congress' concern with the unsuitability of the homes in which neglected or abused dependent children were residing, and the commonality of the needs of children removed:

> Section 2 [establishing the Federal Foster Care Program] would allow the states the option of bringing needy dependent children under the federally aided program where a court of competent jurisdiction finds that the children are not receiving proper care and protection in their own homes and gives responsibility to the State agency to place them in foster family homes.
>
> • • •

> . . . there are some home environments that are clearly contrary to the best interests of these children . . . because of the immoral or negligent behavior of the parent.

See S. Rep. No. 165 87th Cong. 1st Sess. 6, reprinted in [1961] U.S. Cong. and Ad. News, 1721. And the special needs of foster children—including, by definition, the foster children here—and the increased cost of meeting those needs, were the two reasons Congress increased federal sharing for the foster care program in 1967.

> Your Committee believes that some children now receiving AFDC would be better off in foster homes or institutions than they are in their own homes. *This situation arises because of the poor home environment for the child upbringing in homes with low standards,* including multiple instances of illegitimacy. *Foster care is relatively costly,* and States have reported that they cannot finance it without some additional federal help . . .
>
> Under the committee bill, Federal funds will be available on a more liberal basis than for the basic program *out of a recognition that foster family care is more costly than care in the child's home.* Effective July 1, 1969, State plans would have to provide for foster care under these terms. . . . Your committee believes that these liberalizations will be of material assistance to States and localities and will facilitate plans being developed for children *based on the need of the child* rather than the fiscal condition of the local government.

House Report No. 544, 90th Cong. 1st Sess. (1967), pp. 100 101 (emphasis added).

Thus, the "need of the [foster] child" was central to the enactment of the foster care program, and to increased federal funding for the program. The State officials' argument simply ignores this fact, and that Congress never

differentiated the needs of the plaintiff class of foster children from the class of foster children which Illinois does cover.

In enacting the Federal Foster Care Program, Congress was also concerned with the shortage of qualified foster parents. See S. Rep. 165 87th Cong. 1st Sess, 6, reprinted in [1961] U.S. Cong. and Admin. News, 1721 (citing a lag in "development of the most suitable care for children who have to be cared for outside of their own home," as one reason for establishment of the Program). See also Hearings on H.R. 10032 before House Committee on Ways and Means, 87th Cong, 2nd Sess. 295 (Testimony of HEW Secretary Ribicoff). Accordingly, as the practical effect of the State officials' reading of Section 408 is to exclude from consideration as eligible foster parents the whole class of non-legally responsible relatives of the foster children, the effect also is to reject Congress' workable solution to the problem of attracting qualified foster parents.

The State officials, of course, never suggest that relatives, as a class, can not be qualified foster parents. But their exclusion of relatives as foster parents reflects another important way in which the Illinois policy at issue frustrates Congress' intent. That intent, as expressed in 42 U.S.C. §601 (1970) is incorporated in a stated preference for care for all dependent children "in their own homes or the homes of relatives," 42 U.S.C. §601 (1970). All of Title IV is the product of Congress' intent to "help children through the family structure" and a "federal statutory concern for preserving children in a family environment." *Dandridge* v. *Williams*, 397 U.S. 471, 479 (1970). To construe Section 408 to exclude foster children placed by DCFS with related foster parents from Federal Foster Care eligibility therefore attributes to Congress an intent contrary to its specific intent as expressed throughout the Act. Thus

the State officials' reading of Section 408 would have it that Congress enacted a program (the Federal Foster Care program) under which those children perhaps most in need of the special help provided by the program would then be denied its benefits, precisely because they lived with members of their family.

The way in which the Illinois policy at issue here frustrates Congress' intent in this respect is nowhere better illustrated than by the facts of this case. The Illinois policy struck down by the district court had dictated that Larry Youakim remain in an orphanage, and Sherry Youakim with unrelated foster parents—apart fom each other and their brothers and sisters.

CONCLUSION

The District Court and the Court of Appeals herein have concurred in the interpretation of the Social Security Act of the Department of Health, Education, and Welfare and of the Solicitor General of the United States. Moreover, Congressional intent expressed in the legislative history supports this interpretation. In circumstances where this Court has been faced with such agreement between HEW's construction of the Social Security Act and judicial construction of the Act (even in the absence of the unanimous concurrence, which exists here, of all courts considering an issue) summary affirmance of the lower court's ruling has been deemed appropriate. *Maher* v. *Buckner*, 98 S.Ct. 290 (1977) *aff'g mem.* 424 F. Supp. 366, 373 n. 12 (D. Conn. 1976); *Doe* v. *Flowers*, 416 U.S. 922 (1974) *aff'g mem.* 364 F. Supp. 953 (N.D. W.Va. 1973); *Carleson* v. *Taylor*, 404 U.S. 980, *aff'g mem. Taylor* v. *Martin*, 330 F. Supp. 85 (N.D. Cal. 1971); *Swank* v. *Rodriguez*, 403 U.S. 901 (1971) *aff'g mem.* 318 F. Supp. 289 (N.D. Ill. 1970); *Wyman* v. *Boddie*, 402 U.S. 991 (1971) *aff'g mem.* 434 F.2d 1207, 1211

(2nd Cir. 1970); *Shapiro* v. *Solman,* 396 U.S. 5, *aff'g mem.* 300 F.Supp. 409 (D. Conn. 1969). Appellees respectfully submit that the appellants present no substantial question for the decision of this Court and the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

ROBERT E. LEHRER
One of the Attorneys for Appellees

ROBERT P. BURNS
ROBERT E. LEHRER
JAMES D. WEILL
Legal Assistance Foundation of Chicago
343 S. Dearborn,
Chicago, Illinois 60604
(312) 341-1070

PATRICK A. KEENAN
University of Detroit School of Law
Legal Aid Clinic
651 East Jefferson
Detroit, Michigan 48226
(313) 927-1541

APPENDIX

APPENDIX A

DEPARTMENT OF HEALTH, EDUCATION,
AND WELFARE
SOCIAL AID ADMINISTRATION SERVICE
WASHINGTON, D.C. 20201

PROGRAM INSTRUCTION
APA-PI-75-9
October 25, 1974

TO: STATE AGENCIES ADMINISTERING APPROVED PUBLIC ASSISTANCE PLANS

SUBJECT: AFDC Foster Care

COMMENT: This program instruction is issued to resolve the problem of some States not licensing or approving the homes of non-legally liable relatives as foster care homes even though suitable foster care could be provided in the homes and payments made at the foster care rate when children are placed with relatives who meet all conditions of eligibility for AFDC-FC.

There have been several U.S. District Court decisions which have held that States may not refuse to provide the foster care rate to a foster home because it is operated by relatives who have no legal responsibility for support and care of the child.

In addition, the U.S. Supreme Court in the case of *Ramos* v. *Montgomery*, January 18, 1971, upheld making a higher payment for foster care than was provided under a State's standard for AFDC payments.

Under 45 CFR 233.110(a)(1), States must provide for aid in the form of foster care for each otherwise eligible child as specified in the Act and in 233.110(b). Federal financial participation is available for children who are placed in a foster home or non-profit private child-care institutions licensed or approved by the agency which is responsible for licensing or approval of such facilities in the State. These provisions apply regardless of whether the licensed or approved foster family home in which a child is placed is operated by a relative (with no legal responsibility to support the child).

When a child has been removed from his home by judicial determination and is placed in foster care under the various conditions specified in Section 408 of the Social Security Act and 45 CFR 233.110, the foster care rate of payment prevails regardless of whether or not the foster home is operated by a relative. A non-legally liable relative has no financial responsibility towards the child placed with him and the income and resources of such a relative are not factors in determining entitlement to a foster care payment. It must be noted, too, that the 1967 amendments to the Social Security Act liberalized Federal financial participation in the cost of foster care, recognizing foster

family care is more costly than care in the child's own home.

INQUIRIES TO: SRS Regional Commissioners.

Commissioner
Assistance Payments Administration

§233.110 *AFDC foster care.*

(a) *State plan requirements.* A State plan under title IV-A of the Social Security Act must:

(1) Provide that aid will be given in the form of foster care for each otherwise eligible child:

(i) Who was removed after April 30, 1961, from the home of a relative specified in the AFDC plan, as a result of a judicial determination that continuance in the home of the relative would be contrary to his welfare, for any reason, and who has been placed in foster care as a result of such determination; and

(ii) (*a*) Who, in or for the month in which that court action was initiated, was receiving AFDC, or would have received AFDC if application had been made, or

(*b*) Who lived with a relative specified in the AFDC plan within 6 months prior to the month in which that court action was initiated, and who would have received AFDC in or for such month if in such month he had been living with (and removed from the home of) such a relative and application had been made for him; and

(iii) Whose placement and care are the responsibility of the State agency administering or supervising the administration of the AFDC plan, or, if the State so elects, are the responsibility of any other public agency, or type or types of public agencies specified in the plan, with whom the State agency has a currently effective agreement that provides for development of a plan satisfactory to the State agency for AFDC-FC children in accordance with subparagraph (2) of this paragraph and that contains

other provisions necessary to achieve the objectives of the State's AFDC plan.

(2) Provide for development of a plan for each child described in subparagraph (1) of this paragraph, so that:

(i) He will be placed in a foster family home or a child care institution in accordance with his needs;

(ii) His need for and the appropriateness of his care and services in such placement will be reviewed not less frequently than every 6 months;

(iii) Services will be provided to improve the conditions in the home from which he was removed or to make possible his placement in the home of another relative under the State's AFDC plan. (See § 220.19 of this chapter.)

(3) Provide that maximum use will be made of the services of employees of the State public welfare agency responsible for the plan for child-welfare services under title IV.-B of the Act or of any local agency participating in the administration of such plan.

(4) Specify:

(i) In what types of child care institutions (private nonprofit, or public, or both), in addition to foster family homes, placement will be made; and

(ii) Whether payments will be made to foster homes and institutions only or also to other agencies.

(5) Provide that there will be specific criteria for determining the amount of payment for foster care in foster family homes and in child care institutions. In establishing rates of payment to institutions, only those items included for care in foster family homes will be included, and overhead costs of the institution will be excluded.

Under the requirements of this paragraph, provision must be made for both foster family care and institutional care in accordance with the individual child's needs; public institutions may be used, without Federal financial participation, to discharge the institutional obligation in whole or in

part; and the use of institutions outside the State will also meet the requirement for the provision of institutional care.

(b) *Federal financial participation.* (1) Federal financial participation is available, effective January 1, 1968, in AFDC-FC payments not to exceed an average of $100 per month per recipient, made on behalf of children as specified in section 408 of the Social Security Act, who are included in the approved State AFDC plan and who are placed in a foster family home, or nonprofit private child-care institution, licensed or approved by the agency which is responsible for licensing or approval of such facilities in the State where it is situated. The maximum of $100 average per month per recipient may be disregarded when the State claims Federal funds under the provisions of section 1118 of the Act.

(2) Federal financial participation is available in AFDC-FC payments made to an individual providing care in a foster family home, to a private nonprofit child care institution, or to a cooperating public or nonprofit private child placement or child-care agency.

HEW Handbook of Public Assistance Administration, pt. IV, §3452(2) (7/24/63)

Child-Recipient Eligible for Foster Care

To be eligible for assistance as foster care with Federal financial participation under Title IV(a) the child must have been receiving AFDC (money payments and/or medical care) in his own home or in the home of one of the specified relatives who was responsible for his care and control; (b) the child must continue to meet the eligibility requirement of need, deprivation of parental support or care, and age; (c) the child must have received assistance as aid to families with dependent children in or for the month in which court proceedings resulting in the child's removal were instituted; (d) the removal of such child pursuant to the court determination must have been after April 30, 1961.

Handbook, pt. IV, §3452(2) (7/24/63).

APPENDIX B

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

No. 73-6935

MARCEL YOUAKIM and LINDA YOUAKIM, ET AL.,
APPELLANTS

v.

JEROME MILLER

On Appeal From The United States District Court
For The Northern District Of Illinois

MEMORANDUM FOR THE UNITED STATES AS *AMICUS CURIAE*

This memorandum is submitted in response to this Court's order of October 15, 1974, inviting the Solicitor General to present the views of the United States.

STATEMENT

The State of Illinois has a policy whereby it makes a substantial foster care (AFDC-FC) payment pursuant to the federal Aid to Families with Dependent Children (AFDC) program when children are placed in a foster

home with persons who are not related, pursuant to a judicial determination that the children's original home is unsuitable for them. If, however, the persons providing the foster care in such circumstances are related to the children, Illinois denies them foster care payments, unless they can show a need therefor. The foster family may qualify for AFDC payments, which in Illinois are less than the AFDC-FC payments.

Appellants in this case are foster parents caring for children related to them, and the children themselves. They brought a class suit in the United States District Court for the Northern District of Illinois, contending that the Illinois practice of providing higher payments when the foster parents are unrelated to the children violates the Social Security Act and the Equal Protection Clause. A three-judge district court rejected these contentions and dismissed the suit (J.S. App. A).

ARGUMENT

We submit that the Illinois policy of denying foster care AFDC benefits for children living with relatives is invalid because it conflicts with specific criteria for eligibility set forth in the Social Security Act; and that the validity of this practice is a substantial question in the administration of the Social Security Act which warrants plenary review by this Court.

1. In order to qualify for AFDC benefits, a child must be a "dependent child" as defined in 42 U.S.C. 606(a). Under that definition, a child is dependent if it (1) has been deprived of parental support for specified reasons, (2) is living with a relative as defined in the section, and (3) is

under 18 (or, in certain circumstances 21) years of age.[1] The AFDC foster care program is provided under 42 U.S.C. 608, which expanded the definition of "dependent child" to include certain children who, even though not living with relatives, live in foster homes as a result of a judicial determination that they should be removed from their regular homes.[2] A child is eligible for AFDC-FC if

[1] 42 U.S.C. 606(a) provides:

When used in this part—

(a) The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocation or technical training designed to fit him for gainful employment.

[2] 42 U.S.C. 608(a) provides:

Effective for the period beginning May 1, 1961—

(a) the term "dependent child" shall, notwithstanding section 606(a) of this title, also include a child (1) who would meet the requirements of such section 606(a) or of section 607 of this title except for his removal after April 30, 1961, from the home of a relative (specified in such section 606(a)) as a result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child, (2) whose placement and care are the responsibility of (A) the

(footnote continued)

it (1) is a "dependent child" as defined in Section 608(a); (2) lives in a "foster family home" or a "child-care institution" as a result of a judicial determination that the child's home is not suitable for him (Section 608(f)); and (3) meets other conditions of Section 608, not in issue here.

Appellants concededly meet all of these conditions, and therefore qualify for AFDC-FC. The additional requirement imposed by the State of Illinois that children are entitled to AFDC-FC only if the foster home in which they are living is maintained by non-relatives is contrary to the decisions of this Court which have prohibited the states from narrowing specific federal eligibility criteria without

(footnote continued)

State or local agency administering the State plan approved under section 602 of this title, or (B) any other public agency with whom the State agency administering or supervising the administration of such State plan has made an agreement which is still in effect and which includes provision for assuring development of a plan, satisfactory to such State agency, for such child as provided in paragraph (f)(1) and such other provisions as may be necessary to assure accomplishment of the objectives of the State plan approved under section 602 of this title, (3) who has been placed in a foster family home or child-care institution as a result of such determination, and (4) who (A) received aid under such other plan in or for the month in which court proceedings leading to such determination were initiated, or (B)(i) would have received such aid in or for such month if application had been made therefor, or (ii) in the case of a child who had been living with a relative specified in section 606(a) of this title within 6 months prior to the month in which such proceedings were initiated, would have received such aid in or for such month if in such month he had been living with (and removed from the home of) such a relative and application had been made therefore.

congressional authorization. *Townsend* v. *Swank,* 404 U.S. 282, 286; *Carlson* v. *Remillard,* 406 U.S. 598, 601; *King* v. *Smith,* 392 U.S. 309, 333.[3]

Appellees argue (Motion to Dismiss or Affirm, p. 15) that because the Social Security Act "indicates that children ought to be placed, when their return to their natural home is rendered impossible, in the home of a relative, and only thereafter in the home of a stranger * * * the law considers relatives of a child on a nearly equal basis with natural parents." From this they conclude that the state may treat children in foster homes of relatives as if they were still living with their parents, and therefore deny them foster-care payments. The argument is a *non sequitur.*

As already noted, the only qualification for foster-care benefits is that the child be "dependent" and that it be living in a foster home or a child-care institution as the result of a judicial determination that its own home is unsuitable. Those conditions were satisfied here, and the child is therefore entitled to foster-care benefits.

---

[3] There have been several cases in which the state has been permitted to impose additional requirements as conditions of eligibility for AFDC. *Snell* v. *Wyman,* 393 U.S. 323, affirming 281 F. Supp. 856 (S.D. N.Y.); *Wyman* v. *James,* 400 U.S. 309; *Charleston* v. *Wohlgemuth,* 405 U.S. 970, affirming 332 F. Supp. 1175 (E.D. Pa.); *New York State Department of Social Services* v. *Dublino,* 413 U.S. 405. The requirements upheld in those cases, however, were designed to further the purposes of the Social Security Act, such as seeking employment, permitting a home visit by social workers, or agreeing to reimburse the state for assistance received if funds therefor become available. Here, on the other hand, the Illinois system excludes from benefits a class of children who meet the statutory qualifications and, as shown *infra,* (p. 5), the disqualifying condition of living with a relative is opposed to rather than in furtherance of the design of the Social Security Act.

Appellees' argument, rather than supporting their conclusion, points in the opposite direction. The denial of foster-care benefits to children living with relatives is likely to make relatives unwilling to accept the children and lead to the placement of children in foster homes of non-relatives. This result would be inconsistent with the policy stated in 42 U.S.C. 601 that the AFDC program is aimed at "encouraging the care of dependent children in their own homes or in the homes of relatives * * *." Indeed, this policy was the primary basis upon which a district court invalidated, as inconsistent with the Social Security Act, the practice of South Dakota of denying foster-care payments for children living with relatives. *Clampett* v. *Madigan,* No. CIV73-4018, decided May 24, 1973 (D. S.D.). See, also, *Jackson* v. *Ohio Department of Public Welfare,* No. C72-132, decided April 17, 1972 (N.D. Ohio).

Appellants contend that *Ramos* v. *Montgomery,* 331 F. Supp. 1197 (S.D. Cal.), affirmed, 400 U.S. 1003, controls this case. That case, however, merely held that where a child was not eligible for foster-care benefits because he did not meet the condition in Section 608 that he had been removed from his home as a result of a judicial determination, the foster parents were not entitled to receive foster-care payments. The present case, however, involves the totally different situation where the child does qualify for foster-care payments but the state denies those payments because relatives provide the foster care.

2. The question is an important one in the administration of the Act. We are informed by the Department of Health, Education and Welfare that in addition to Illinois, 13 other states currently deny full foster-care pay-

ments to foster parents caring for related children. Approximately 28 percent of AFDC recipients are living in those states. The issue thus has substantial impact, and warrants definitive resolution by this Court.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1975.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

NINA JONES, et al,

Plaintiffs,

vs.

RICHARD DAVIS, et al,

Defendants.

Civil No. 76-805

OPINION AND RECOMMENDATION

Plaintiffs Nina Jones and Robert Hollings bring this action for themselves and all others similarly situated to enjoin the enforcement of the State of Oregon's policy and practice of refusing foster care payments to children who are removed from their homes by judicial determination and placed in the homes of relatives. The defendants are Richard Davis, Director of Human Resources of the State of Oregon, J. N. Peet, Administrator of the Children's Services Division (CSD), and Leo Hegstrom, Administrator of the Public Welfare Division. Defendants are hereinafter referred to as State.

The action has been certified as a class action. The parties have signed a stipulation of facts and have submitted cross motions for summary judgment on the issue of whether the above policy and practice either violates the equal protection clause of the 14th amendment or conflicts with the Supremacy Clause of the United States

Constitution. For the following reasons, I find that the policy and practice is in conflict with the Supremacy Clause and is therefore invalid.

Robert Hollings is 14 years old. On April 7, 1976, he was removed from the home of his mother by the Circuit Court of the State of Oregon for Multnomah County. He was placed in the custody of CSD for care, placement, and supervision. That same day, CSD placed Robert with his aunt, Nina Jones. The Jones home had previously been certified as a foster home by CSD for an *unrelated* foster child. However, when Mrs. Jones requested foster care payments for Robert, she was refused on the grounds that Robert was related to her. Mrs. Jones does receive the Aid to Dependent Children payment for Robert, which amounts to $77.00 per month. Under the foster care program, she would receive $182.00 per month.[1]

Both the Aid to Dependent Children (ADC) and Aid to Dependent Children—Foster Care (FC) are subsidized by the federal government through Title IV of the Social Security Act, 42 U.S.C. § 601, *et seq.* Under the Act, ADC is available to needy children who have been deprived of parental support because of death, continued absence, or incapacity, and who are living with a specified relative. FC is available to a needy child (1) who has been removed from his home by judicial determination, (2) whose placement and care are the responsibility of the state agency (CSD), (3) who has been placed in a foster home, and (4) who was or would have been eligible for ADC within six months prior to the removal from his home. 42 U.S.C. § 608.

[1] The exact amount of money payments to children under either program is left to the discretion of the state. The state can choose to make payments in the form of foster care either more, less or the same as other Aid to Dependent Children payments.

Participation in either ADC or FC is not required of the State. However, if a state chooses to participate and establishes a "State Plan" which is not inconsistent with the federal Act or the regulations promulgated thereunder by the Department of Health, Education and Welfare, a state is eligible for federal financial participation in the costs of the program. Oregon has chosen to participate in both ADC and FC.

As noted above, Robert is currently receiving ADC payments from the State. However, under Oregon law, Robert is not eligible for the higher FC payment because Oregon defines a *foster home* as

> any home maintained by a person who has under his care in such home any child under the age of 18 *not related* to him by blood or marriage and unattended by his parents or guardian, for the purposes of providing such child with care, food and lodging . . . . ORS 418.625(2).

Thus, since Robert has been placed in the home of his aunt, he has not been placed in a "foster home" and has not met the third criterion of 42 U.S.C. § 608.

The regulations of the Department of Health, Education and Welfare define the times when a state plan may exclude groups of citizens from federal assistance programs:

> 45 C.F.R. § 233.10(a)(ii): A state may:
> (A) Provide more limited public assistance coverage than that provided by the Act *only where the Social Security Act or its legislative history authorizes more limited coverage.* . . .

The State argues that the legislative history of the Act reflects a Congressional intent to distinguish between the two types of aid on the basis of whether the recipient

lives with a relative or a non-relative. I do not agree. Originally, the only available federal aid through the Act was ADC. Then, in 1961, Congress created a new category for recipients by adding Section 608. This new program (foster care)

> would allow the States the option of bringing needy dependent children under the federally aided program *where a court of competent jurisdiction finds that the children are not receiving proper care and protection in their homes and gives the responsibility to the State agency to place them in foster family homes.*
>
> • • •
>
> The lack of financial resources for such care has hindered the development of the *most suitable care* for children who have to be cared for outside their own home. S. Rep. No. 165, 87th Cong., 1st Sess; 1961 *U.S. Code Cong. & Adm. News* 1721.

In my opinion, the distinction that Congress intended to make was whether the recipient had been removed from the home by judicial determination and placed in the custody of the state agency, not whether the agency eventually placed him in a home of a relative or non-relative. If, under all the circumstances, placement in the home of a relative would provide the *most suitable care* for the child,[2] there is no valid reason to penalize

[2] It would seem that Congress believes relatives' homes are most desirable. The purpose of Title IV is declared in 42 U.S.C. § 601 to be that of "encouraging the care of dependent children in their own homes or in the homes of relatives . . . with whom they are living to help maintain and strengthen family life. . . ." While this section was enacted prior to the amendment on foster care, it indicates an overall purpose for the entire Act, including the amendments on foster care.

the recipient by denying him the full payment for foster care. Relatives such as Mrs. Jones have no legal responsibility to contribute to the support of children such as Robert.

These conclusions are further strengthened by the language of the Act itself. 42 U.S.C. § 608(b) states:

> [T]he term "aid to families with dependent children" shall . . . include also foster care in behalf of a child described in paragraph (a) of this section—
> (1) in the foster family home of *any individual,* whether the payment therefor is made to such individual or to a public or nonprofit private child-placement or child-care agency . . . .

The State attempts to justify its position by arguing that it *does* give foster care to a child placed "in the foster home of any individual." It simply does not include relatives' homes in its definition of "foster family home." This added restriction in the definition, however, cannot be justified under either the declared purpose[3] or the language of the Act. The Act defines "foster family home" as follows:

> For purposes of this section, the term "foster family home" means a foster family home for children which is licensed by the State in which it is situated or has been approved, by the agency of such State responsible for licensing homes of this type *as meeting the standards established for such licensing* . . . . 42 U.S.C. § 608.

Surely, these standards for licensing or approval refer to fire regulations, cleanliness, balanced diet, etc. Certainly CSD would not place children in their custody in

[3] See note 2.

any home that did not meet the basic standards. But the concept of approval should be limited to aspects relating to the welfare of the child. The criterion of approval based on blood relation may well go against the best interest of the child.

Further, the interpretation of a statute by the agency charged with its enforcement is a substantial factor to be considered in construing the statute. *Youakim* v. *Miller*, 44 U.S.L.W. 4467, 4468 (March 31, 1976). On October 25, 1974, the Department of Health, Education and Welfare issued a "Program Instruction"[4] to state agencies administering approved public assistance plans. It states in pertinent part:

> Under 45 CFR 233.110(a)(1), States must provide for aid in the form of foster care for each otherwise eligible child as specified in the Act and in 233.110(b). Federal financial participation is available for children who are placed in a foster home or non-profit private child-care institutions licensed or approved by the agency which is responsible for licensing or approval of such facilities in the State. These provisions apply regardless of whether the licensed or approved foster family home in which a child is placed is operated by a relative (with no legal responsibility to support the child).
>
> When a child has been removed from his home by judicial determination and is placed in foster care under the various conditions specified in Section 408 [42 U.S.C. § 608] of the Social Security Act and 45 CFR 233.110, the foster care rate of payment prevails regardless of whether or not the foster home is operated by a relative.

[4] Program Instruction APA-PI-75-9, October 25, 1974.

Finally, in *Youakim* v. *Miller*, No. 73 C 635 (D. Ill. July 27, 1976),[5] the court considered a similar Illinois statute[6] and concluded that it violated Title IV of the Social Security Act and the Supremacy Clause of the United States Constitution. The State of Oregon's attempts to distinguish *Youakim* from the present case have no merit. *See also Clampett* v. *Madigan*, Civ. No. 73-4018 (D. S.D. May 24, 1973).

In conclusion, after review of the legislative history and explicit language of Title IV of the Social Security Act, the interpretation of the statute by the agency, and the applicable case law, I find that the Oregon policy and practice, insofar as it denies eligibility for foster care payments to foster parents providing homes for children related to them, violates Title IV of the Social Security Act. Because of the Supremacy Clause of the United States Constitution, article VI, clause 2, the challenged statutes must fall. *Van Lare* v. *Hurley*, 421 U.S. 338 (1975); *King* v. *Smith*, 392 U.S. 309 (1968). It is unnecessary for me to reach the equal protection issue.

Accordingly, plaintiffs' motion for summary judgment should be granted.

Dated this 31 day of January, 1977.

/s/ *George Juba*
United States Magistrate

[5] Originally, a three-judge court held that the Illinois statutory scheme did not violate the equal protection clause and granted judgment for the defendant State. *See* 374 F. Supp. 1204 (D. Ill. 1974). The United States Supreme Court remanded the case for the District Court to consider the Supremacy Clause issue. *See* 44 U.S.L.W. 4467 (March 31, 1976).

[6] " 'Foster family home' means a facility for child care in residences of families who receive no more than [eight] children unrelated to them . . . for the purpose of providing family care and training for the children on a full-time basis." Ill. Rev. Stat. 2212.17.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

NINA JONES, et al.,

Plaintiffs,

vs.

RICHARD DAVIS, et al.,

Defendants.

CIVIL NO. 76-805

JUDGMENT AND ORDER

IT IS ORDERED:

1. ORS §418.625 and CSD Rule 22.105, to the extent they prevent the certification of foster homes solely because the homes are operated by persons related to the foster children, are invalid.

2. Defendants shall promptly commence payment of the full foster care rates and shall provide all corresponding benefits and services to all otherwise eligible persons who were providing foster care on or subsequent to February 1, 1977, but who were not receiving such payments or services because of the provisions declared invalid herein. These payments shall be made effective as of the date each such person began providing foster care, but in no case earlier than February 1, 1977.

3. Defendants shall further notify such persons, by the notice attached hereto, that they are now eligible for such payments and services and the reasons therefor.

4. Plaintiffs are entitled to recover judgment against Defendants for their actual costs as taxed by the Clerk in the amount of $....., plus an award of attorney's fees in the amount of $1,650.00.

Dated this 8 day of April, 1977.

/s/ James M. Burns

Judge James M. Burns

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

CIV73-4018

Marie Clampett, individually and on behalf of her foster children, Joseph Packard, Jr., Marcus Packard, and Cynthia Packard, and Evelyn Staub, individually and on behalf of her foster children, Doyle Medicino Eagle and Timothy Medicino Eagle, and on behalf of themselves and all others similarly situated,

Plaintiffs

vs.

John E. Madigan, individually and in his capacity as Director, State Department of Public Welfare, and his agents, representatives and assigns of the State Department of Public Welfare,

Defendants

MEMORANDUM DECISION

Mr. Stephen L. Povar, of Rosebud, South Dakota, appeared in behalf of the plaintiffs;

and

Mr. R. K. Krogstad, Special Assistant Attorney General,

Department of Public Welfare, of Pierre, South Dakota, appeared in behalf of the defendants.

This is a civil rights suit instituted pursuant to 42 U.S.C. Sec. 1983, seeking declaratory and injunctive relief authorized by 28 U.S.C. Secs. 2201, 2202, and by Rule 57 of the Federal Rules of Civil Procedure. Plaintiffs also seek to maintain the suit as a class action as provided by Fed. R. Civ. P. 23(a), (b)(2) & (b)(3). Jurisdiction is conferred upon this court by 28 U.S.C. Sec. 1343(3) & (4).

The plaintiffs are two similarly situated mothers who are related to the foster children residing in their homes. Marie Clampett and her husband reside in Lake Andes, South Dakota, with their five children and three foster children. The three foster children were placed there by the South Dakota Department of Public Welfare (DPW). Authority was given to make such a placement on December 1, 1972, by an order of the Rosebud Sioux Tribal Court. Public assistance payments of $144 per month were granted plaintiff Clampett upon her application for Aid to Dependent Children (ADC). Marie Clampett is the paternal aunt of the foster children, Joseph, Marcus and Cynthia Packard.

On November 1, 1972, at the conclusion of a foster home study conducted by the DPW, the Clampett home was recommended for licensing as a foster care home. *See* SDCL Secs. 26-6-9 to 26-6-11 (1967). On November 27, 1972, plaintiff Clampett requested that her foster children be removed from ADC and that she be paid foster care payments for their care. That request was denied. At her fair hearing appeal the denial was affirmed (1) because "state foster care funds are not used to pay a relative," and (2) because six is the maximum number

of children permitted to reside in a licensed foster care home, including the children of the foster parents. The Clampett home exceeded this limitation by two, precluding eligibility for foster care payments. Plaintiff Clampett has continued to receive assistance through the ADC program.

Evelyn Staub and her husband reside in Winner, South Dakota, with two foster children placed there by the DPW. Subsequent to a declaration that the two children were dependent and wards of the State, a court order issued by the Tenth Judicial Circuit of the State of South Dakota on October 1, 1972, gave the DPW custody of Doyle and Timothy Medicine Eagle. Mrs. Staub is the great aunt of these foster children. Plaintiff Staub formally requested foster care payments on February 14, 1973. Based upon the policy established by the South Dakota Public Welfare Commission, which prohibits payment of foster care funds to relatives within a certain degree, Mrs. Staub's request was denied.

Jointly, the two plaintiffs, on their own behalf and on behalf of all others similarly situated, initiated this civil rights action to enforce their Constitutional rights of due process and equal protection of the laws, as provided by the Fourteenth Amendment, and to correct an alleged deprivation of their rights granted under the Social Security Act of 1935. 42 U.S.C. Sec. 301 *et seq.* Their requests for a temporary restraining order and a preliminary injunction have been denied. A hearing for a permanent injunction was held and the plaintiffs submitted a brief. The defendants waived filing a brief, preferring to rely upon their oral argument and a reproduced copy of that portion of the Manual of the South Dakota State Department of Public Welfare regulations pertaining to foster care to explain their position.

The State of South Dakota has a state-wide foster care program. That program, as evidenced by the Manual of the South Dakota State Department of Public Welfare (hereinafter "Manual") is financed by a number of separate and independent sources, each containing their own prerequisites which must be complied with before their funds are available. These various sources of revenue, which provide the support for foster children, are all administered locally by the DPW and subject to its regulations. *See* Manual of the South Dakota State Department of Public Welfare Part IV-5F. The State's funds (State Foster Care) are used to supplement these diverse sources of funding. One such source of funding the State may look to for support of a dependent child is ADC Foster Care (Federal Foster Care), representing the federal contribution to this State program. However to be eligible for Federal Foster Care the foster child must comply with that program's listed requirements. Manual at IV-5F-12 to 14. The State Foster Care funds are also subject to certain other limitations.

The State regulation in issue provides that "State Foster care funds are not used to pay a relative." Manual at IV-5F-14. A "relative" under these circumstances is a:

> a) father; mother; grandfather; grandmother; brother; sister; stepfather; stepmother; stepbrother; stepsister; uncle; aunt; first cousin; nephew or niece; including those of half-blood.
>
> b) relatives of the preceding generation denoted by prefixes of grand or great, as specified in subparagraph (a).
>
> c) • • •
>
> d) • • •

See Manual at IV-5F-13 & 14.

It is this State administered program, with its accompanying State regulations, which has come under attack by the plaintiffs.

The plaintiffs contend that they are being denied the economic advantages of foster care payments because they are related to the foster children placed in their homes. They reason that a system of aid which allows more money for the placement of foster children in entirely strange homes, rather than with relatives, tends to economically induce the placing of dependent children in unrelated foster homes and, consequently, denies the child the benefit of social and psychological ties already present within the existing family structure. Currently, the foster children in question receive approximately $36 per month on ADC. If they were found eligible for foster care payments under the State's regulations, plaintiffs would receive $65 per month, with an additional allowance for clothing. Manual at IV-5F-15.

The plaintiffs assert in their amended complaint that the exclusion of relatives from the foster care program was established by the South Dakota Public Welfare Commission and is in violation of the Social Security Act of 1935 because: (1) it discourages the maintenance of a family life between dependent children and related foster parents contrary to the stated purpose of the Social Security Act, 42 U.S.C. Sec. 601; and (2) Title IV-5F of the DPW's Manual violates the Social Security Act because its regulations do not determine need and the amounts of assistance for *all* applicants on an objective and equitable basis as demanded by the United States Department of Health, Education and Welfare's (HEW) regulations. 45 C.F.R. Sec. 233.20(a)(1).

I am persuaded by the plaintiffs' arguments and agree with their contentions. In addition, I find that the most efficient method for correcting this state-wide application of this regulation is to permit the plaintiffs to proceed as a class pursuant to Fed.R.Civ.P. 23(a), (b)(2). The plaintiffs are representative of that class of people who, as relatives of foster children not legally obligated for such children's support, are being denied foster care assistance by the defendants as directed by the DPW's regulation. Manual at IV-5F-14.

The State of South Dakota has chosen to participate in the provisions of the Social Security Act of 1935, 42 U.S.C. Sec. 301 *et seq.* States desiring the advantages of the substantial federal funds available in administering categorical assistance programs must conform with the requirements of the Social Security Act and with the rules and regulations promulgated by HEW. King v. Smith, 392 U.S. 309, 317, n.34, 88 S.Ct. 2128, 20 L.Ed.2d 1118 (1968). South Dakota has chosen to participate in this federal program and has provided for receipt of the federal monies disbursed thereunder. SDCL 26-4-10 (Supp. 1973).

That portion of the Social Security Act of immediate concern to these plaintiffs is the part authorizing Aid to Families With Dependent Children (AFDC), 42 U.S.C. Secs. 601 *et seq.*, denominated Aid to Dependent Children (ADC) under South Dakota law. SDCL Chapter 28-7 (1967).

Congress expressed its purpose for enacting the AFDC program at 42 U.S.C. Sec. 601.

> For the purpose of encouraging the care of dependent children in their own homes *or in the homes of relatives* by enabling each State to furnish financial assistance and rehabilitation and other services, . . .,

> to needy dependent children and the parents *or relatives* with whom they are living to help maintain and strengthen family life and to help such parents *or relatives* to obtain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, ... (emphasis added.)

This purpose has been defeated by the provisions of Title IV-5F of the DPW's Manual. Keeping in mind the economic realities of raising foster children, the South Dakota regulations discourage relatives from opening their homes to related dependent children by refusing to pay related foster parents the same amounts paid to unrelated foster parents. The State has determined that $65 per month, plus a clothing allowance, is necessary to adequately support a foster child. Manual at IV-5F-15. Nevertheless, under a regulation promulgated by the Public Welfare Commission, if the foster home is that of a relative, foster care funds are denied to those substitute parents and other assistance must be sought. This pecuniary distinction is imposed upon related foster parents even though they are not legally obligated to support the dependent child prior to placement, SDCL Chapter 25-7, as amended, and in spite of the well-recognized fact that "it costs more to support a child in a foster home than in his own home." Ramos v. Montgomery, 313 F.Supp. 1179, 1182 (S.D.Cal. 1970), *aff'd mem.* 400 U.S. 1003 (1970); *see also* Senate Report No. 744, 2 U.S. Code Cong. & Admin. News 2834, 3001 (1967). The State, once having determined that a foster child required $65 per month for adequate support, "may not assume that a (welfare) recipient's relatives, not legally responsible for his support, will charge less than other persons providing (similar care)." Marotti v. White, 342 F.Supp. 823, 826 (D.Conn. 1972).

The plaintiffs' second contention, establishing a conflict between South Dakota's regulatory scheme and the HEW regulations promulgated pursuant to the Social Security Act, pertains to the requirements for State plans receiving federal financial participation. In particular, 45 C.F.R. Sec. 233.20 directs "that the determination of need and amount of assistance for all applicants and recipients will be made on an objective and equitable basis . . .." The defendants did not address themselves to this specific issue and, in any event, this court feels their argument would be frivolous in light of the well-reasoned opinions cited by plaintiffs in their brief.

The defendants have sought, generally, to justify the foster care payment differential by pointing out that their definition of "foster care" calls for a "social service which provides substitute care for a child for a planned period outside his own *or a relative's home* when his own family cannot care for him for a temporary or extended period." (emphasis added) Manual at IV-5F-1. Thus, as I interpret the defendants' argument, by definition the relatives of dependent children, children who have otherwise qualified for South Dakota's foster care program, are precluded that financial assistance found necessary to adequately support a foster child solely because of this familial tie; a kinship which under South Dakota law incurs no legal obligation to support and care for those dependent children until placed there by the DPW. This argument is unpersuasive and fails to justify the State's discrimination.

This court finds that a conflict exists between the stated purpose of the Social Security Act of 1935 along with the regulations promulgated thereunder, and the South Dakota foster care regulations. The discrimination in

payments between the two classes of otherwise similarly situated foster parents discourages the rehabilitation of a child's family life with relatives, and to this extent the State welfare regulations are inconsistent with the Social Security Act. Therefore, this court finds for the plaintiffs and enjoins the defendants from denying foster care payments to otherwise qualified applicants solely because the foster parent is related within a certain degree to the foster child.

Plaintiff Marie Clampett, under the facts of this decision, would be eligible for foster care payments for one of her foster children. Plaintiff Evelyn Staub is eligible for foster care for both of her foster children. Plaintiffs will submit an order in conformity with this memorandum decision.

Done and entered at Sioux Falls, South Dakota, this 24th day of May, 1973.

By The Court:

Fred J. Nichol
Chief Judge

UNITED STATES DISTRICT COURT
For The
NORTHERN DISTRICT OF OHIO
Eastern Division

IRENE JACKSON
331 Highland SE
Massillon, Ohio
Individually and on behalf of a class of persons similarly situated,

Plaintiffs

-vs-

OHIO DEPARTMENT OF PUBLIC WELFARE
c/o John E. Hansan, Director
408 East Town
Columbus, Ohio

and

STARK COUNTY WELFARE DEPARTMENT
c/o Logan Burd, Director
Seventh Floor
Stark County Office Building
Canton, Ohio

Defendants

CASE NO. C72-182

ORDER

On agreement of the plaintiffs and defendants and upon consideration of the Complaint and Stipulation filed herein it is hereby ORDERED, ADJUDGED, AND DECREED:

1. That Plaintiffs are entitled to a declaratory judgment that Section 1025 of the Regulations of the Department of Public Welfare, as amended by Manual Transmittal Letter #159 (issued pursuant to the interpretation of the Chicago Regional Office of HEW referred to in amended paragraph 10 of the Complaint), is inconsistent with the Social Security Act insofar as said section, as amended, eliminates the possibility of using the ADC foster care rate (Section 1042 of the Regulations of the Department of Public Welfare) in situations where the child is in the home of a collateral relative or in the home of a lineal relative not owing a legal duty to support such child.

2. That Plaintiffs are entitled to a preliminary and permanent injunction restraining Defendants, the Ohio Department of Public Welfare and the Stark County Welfare Department, from enforcing Section 1025 of the Regulations of the Department of Public Welfare, as amended by Manual Transmittal Letter #159 (issued pursuant to the interpretation of the Chicago Regional Office of HEW referred to in amended paragraph 10 of the Complaint), and from enforcing the directive of Mr. Carl Albu, Deputy Director, dated November 22, 1971, insofar as they eliminate the possibility of using the ADC foster care rate (Section 1042 of Regulations of the Department of Public Welfare) in situations where a child is in the home of a collateral relative or in the home of a lineal relative not owing a legal duty to support such child.

3. That the Defendant, Ohio Department of Public Welfare, shall promulgate within sixty days of the date of filing of this Order a new regulation not inconsistent with this Order.

4. That the Defendant, Stark County Welfare Department, shall forthwith reinstitute payments at the foster

care rate to the named Plaintiff, Irene Jackson, on behalf of Rene and Kathy Richards, according to the schedule of foster care payments in effect prior to Manual Transmittal Letter #159 and the directive of Carl Albu, Deputy Director, dated November 22, 1971.

5. That one third of the costs of this action shall be paid by Plaintiffs and two thirds by the Defendant, Ohio Department of Public Welfare.

6. That all other relief prayed for by Plaintiffs in their Complaint shall be, and is hereby, denied.

Approved:
/s/ *Leroy J. Conti, Jr.*
Leroy J. Conti, Jr., Judge
William J. Brown
Attorney General
/s/ *Albert W. Hoguet* 4/6/72
Albert W. Hoguet
Assistant Attorney General
State House Annex
Columbus, Ohio 43215
David D. Dowd, Jr.
Prosecuting Attorney
/s/ *James D. Snively*
James D. Snively
Assistant Prosecuting Attorney
Stark County Court House
Canton, Ohio 44702
Attorney for Defendants
/s/ *Lloyd B. Silverman*
Lloyd B. Silverman, Esq.
Stark County Legal Aid Society
730 Renkert Building
Canton, Ohio 44702
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

Robert E. Lehrer hereby certifies that he is one of the attorneys for the appellees in *Youakim* v. *Miller,* No. 77-742, and that on January 6, 1978 appellees' "Motion to Affirm" was served on the appellants herein. Service was made by mailing 3 copies of this Motion to the counsel of record for appellants.

William J. Scott,
Attorney General of the State of Illinois,
160 North LaSalle Street, Suite 900,
Chicago, Illinois 60601 (312-793-3500),
Attorney for Appellants.

Paul J. Bargiel,
Paul V. Esposito,
Imelda R. Terrazino,
Assistant Attorneys General,
160 North LaSalle Street, Suite 800,
Chicago, Illinois 60601 (312-793-5635),
Of Counsel.

/s/ *Robert E. Lehrer*
Robert E. Lehrer